STATE OF MICHIGAN

COURT OF APPEALS

KRISTEN BRITTON, a Minor and JOSEPH F. LAVEY, II, Conservator for KRISTEN BRITTON, a Minor,

Plaintiffs-Appellants,

v

DONNA BEAUCHAINE and LARRY PITTMAN,

Defendants-Appellees.

and

DIANE MILLS and ANN PICOTTE

Defendants.

UNPUBLISHED
October 30, 2003

No. 244640
Marquette Circuit Court
LC No. 97-034032-CZ

Before: Meter, P.J., and Saad and Schuette, JJ.

PER CURIAM.

Plaintiffs Kristen Britton and her conservator, Joseph F. Lavey II, appeal as of right from a trial court's order dismissing their battery and false imprisonment claims. We affirm.

I. FACTS

This case arises from the gynecological examination of minor Kristen Britton on April 23, 1996. Plaintiff Kristen Britton is a severely mentally impaired minor suffering from cerebral palsy, impaired vision, and other physical impairments rendering her incapable of speaking and controlling her bowel and bladder functions. In February 1996, when plaintiff was a nine-year-old special education student at K.I. Sawyer Elementary School in Gwinn, a teacher's aide, Diane Mills, noted while changing plaintiff's diaper that plaintiff's genitalia appeared to be irritated and swollen. Sandy Knoebel, who was nearby, also noticed the condition of plaintiff's genitalia and, consequently, she contacted school principal Ann Picotte.

The next day, Picotte looked at plaintiff's genitalia during a diaper change and agreed that plaintiff's condition "was not normal". Suspecting child abuse, Picotte contacted the police.

Michigan State Trooper Donna Beauchaine responded to the school on February 9, 1996, and she, too, looked at plaintiff's genitalia. Defendant Beauchaine testified that she saw abrasions and scabbing resembling a rug burn near plaintiff's vagina and she determined that it "appeared" that plaintiff had been sexually molested. She contacted defendant Larry Pittman of the Family Independence Agency to report the suspected abuse. Beauchaine testified that she advised the school personnel to contact her if plaintiff came to school in a similar condition.

In March 1996, school personnel contacted Beauchaine to report that plaintiff had a rash on her vagina. Beauchaine testified that she still believed it was possible plaintiff was being sexually molested. However, Beauchaine apparently took no action as a result of the March 1996 phone call from the school. On April 23, 1996, Picotte was again summoned to plaintiff's classroom to observe her diaper change. Picotte noted that plaintiff's vagina appeared to be irritated and "dilated". Consequently, Picotte again contacted Beauchaine. Beauchaine instructed Picotte to take plaintiff to the office of Connie Ryan Hedmark, M.D., a gynecologist in Marquette. Beauchaine also contacted Pittman and asked him to meet her at the doctor's office.

Pittman went to the doctor's office as Beauchaine requested. The doctor's receptionist indicated that consent was needed for plaintiff's examination because she was a minor. Pittman testified that he told the receptionist that neither a parent nor legal guardian was present to sign the form, but, according to Pittman's testimony, the receptionist responded that any adult signature would suffice. Beauchaine asked Pittman to the sign the consent form, and he did, crossing out the word "parent" and leaving "legal guardian" next to his name. Pittman indicated on the form that he was a "children's services worker."

Picotte took plaintiff to the doctor's office along with Mills. Susan Ritter, M.D., Dr. Ryan's partner, performed plaintiff's examination, which included taking swab samples of plaintiff's mouth, vagina, and rectum for a state police "rape kit." Dr. Ritter testified that she did not find anything unusual during her examination of plaintiff, including no evidence of sexual abuse.

Plaintiff's parents, Kristina and Clinton Britton, were not notified that their daughter had undergone a gynecological examination until the following day, when Beauchaine and Pittman interviewed them at their home. After her conversation with Beauchaine, Kristina Britton and her sister-in-law, Robin French, took plaintiff to be examined by physicians assistant Mark Kreiss.

Ultimately, no criminal charges were filed against Clinton Britton, who was initially suspected of the alleged abuse, or anyone else. Plaintiffs filed the instant lawsuit on November 3, 1997, alleging false imprisonment, battery, and a violation of Kristen's Fourth Amendment right to be free from unreasonable search and seizure. On March 3, 2000, the Marquette Circuit Court granted summary disposition on all claims to all defendants, Mills, Beauchaine, Pittman, and Picotte, finding that all four were immune from suit under the Child Protection Law, MCL 722.621, *et. seq.*

Plaintiffs subsequently appealed to this Court, which affirmed the trial court's grant of summary disposition to Mills and Picotte on all counts and summary disposition of plaintiffs' constitutional claim against all defendants. This Court found, however, that the trial court erred in finding that the Child Protection Law's immunity provision applied to defendants Beauchaine

and Pittman. Thus, this Court remanded on the remaining battery and false imprisonment claims against Beauchaine and Pittman.

On remand, the trial court presided over a two-day jury trial before granting defendants' motion for a directed verdict. The trial court found that defendants' "search" of plaintiff comported with the Fourth Amendment because it was compelled by "exigent circumstances" and defendants were privileged based on the search warrant statute, MCL 780.751, to facilitate the search. This appeal ensued.

II. LAW OF THE CASE

Plaintiffs first argue that the trial court violated this Court's instructions on remand by applying search and seizure law instead of the more specific requirements of the Child Protection Law, MCL 722.621, *et. seq.* in violation of the law of the case doctrine. We disagree.

A. Standard of Review

Whether the law of the case doctrine applies is a question of law subject to de novo review. *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001), citing *Kalamazoo v Dep't of Corrections (After Remand)*, 229 Mich App 132, 135; 580 NW2d 475 (1998). The grant or denial of a directed verdict is subject to de novo review, *Smith v Jones*, 246 Mich App 270, 273; 632 NW2d 509 (2001), as are questions of statutory interpretation. *Sweatt v Dep't of Corrections*, 468 Mich 172, 177; 661 NW2d 201 (2003). The grant of summary disposition pursuant to MCR 2.116(C)(7) is also subject to de novo review. *Lavey, supra*, at 249.[1]

B. Analysis

The law of the case requires that a lower court follow an appellate court's decision regarding an issue on remand, and this doctrine also requires that the appellate court follow its earlier decisions while considering subsequent appeals. *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000). This doctrine "'merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power.'" *Locricchio v Evening News Ass'n*, 438 Mich 84, 109; 476 NW2d 112 (1991), quoting *Messenger v Anderson*, 225 US 436, 444; 32 S Ct 739; 56 L Ed 1152 (1912). It applies where a subsequent proceeding involves "the same set of facts, the same parties, and the same question of law" as an earlier proceeding. *Manistee v Manistee Firefighters Ass'n*, 174 Mich App 118, 125; 435 NW2d 778 (1989). But its application is limited to questions "actually decided" and "necessary" to the court's previous decision. *Kalamazoo, supra*, at 135, citing *Poirier v Grand Blanc Twp (After*

[1] It appears that the trial court decided this as a motion for summary disposition pursuant to MCR 2.116(C)(7), even though it was presented as a motion for a directed verdict. This conclusion is based on the trial court's statement that, in making its decision, it considered the trial testimony as well as "the entire file[and] all the discovery information" with which it became familiar during "prior motions." This is not the standard employed when a trial court considers a motion for a directed verdict.

Remand), 192 Mich App 539, 546; 481 NW2d 762 (1992). The law of the case doctrine is aimed at promoting consistency and "avoid[ing] reconsideration of matters once decided during the course of a single lawsuit." *Id.*, citing *Bennett v Bennett*, 197 Mich App 497, 499-500; 496 NW2d 353 (1992).

Here, plaintiffs argue that the trial court violated this Court's instructions on remand. Particularly, plaintiffs fault the trial court for applying "the more general search and seizure law where a more specific child protection law applied." Plaintiffs argue, "[T]his Court held th[at] the Child Protection Law, MCL 722.621, *et. seq.*, outlines various requirements regarding the reporting and investigation of suspected child abuse." *Id.* However, this portion of the opinion in the prior case is *obiter dicta* – a "statement[] concerning a principle of law not essential to determination of the case." *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 597; 374 NW2d 905 (1985). As such, it cannot be read to establish a new hierarchy of investigative procedure, as plaintiffs suggest. See *id*.

This Court did not "decide" which body of law – i.e., the Child Protection Law or general search and seizure principles – applied or even whether the application of one excluded the application of the other. This Court affirmed the dismissal of plaintiffs' Fourth Amendment claim. *Lavey, supra*, at 250. But it did not examine defendants' conduct in light of the Fourth Amendment; therefore, it cannot accurately be said that the trial court's decision was precluded by the law of the case. See *Kalamazoo, supra*, at 135, citing *Poirier, supra,* at 546.

Plaintiffs also argue that MCL 722.628 and the act's stated purpose demonstrate the Legislature's intent to take child abuse cases out of the realm of criminal investigation – and, necessarily, out of the realm of search and seizure principles derived from criminal procedure. Nothing in the plain language of these statutory provisions indicates that the Legislature intended to subject the investigating law enforcement agency to the department of social services' control or vice versa. The statutes indicate that the department of social services *and* the police are to investigate suspected child abuse, and the two entities are required to cooperate with one another. The plain language of the Child Protection Law simply does not support plaintiffs' contention that the Legislature intended that the Child Protection Law relegate law enforcement to a position where police officers "take direction" from the department of social services employees. The trial court did not err in using the Fourth Amendment analysis on remand.

III. FOURTH AMENDMENT AND EXIGENT CIRCUMSTANCES

Plaintiff argues that defendants conducted a warrantless search of plaintiff's person that was not supported by probable cause or exigent circumstances and in so doing, they violated the Fourth Amendment. We disagree.

A. Standard of Review

The grant or denial of a directed verdict is subject to de novo review. *Smith, supra*, at 273. The grant of summary disposition pursuant to MCR 2.116(C)(7) is also subject to de novo review. *Lavey, supra,* at 249.

B. Analysis

Two of plaintiffs' claims survived summary disposition and appellate review – plaintiff's claims of battery and false imprisonment. Assuming *arguendo* that the torts were committed, the issue is whether defendants Beauchaine and Pittman were privileged to commit these intentional torts pursuant to their investigation of suspected child abuse. The purported privilege exists only if the search and seizure comported with the Fourth Amendment. We find that the search and seizure did comport with the Fourth Amendment and that defendants' actions fall within the scope of privileged acts caused by exigent circumstances and substantiated by probable cause.

The United States Supreme Court articulated the standard for testing the reasonableness of a search or seizure as a "balancing [of] the extent of the intrusion against the need for it." *Tennessee v Garner*, 471 US 1, 7-8; 105 S Ct 1694; 85 L Ed 2d 1 (1985). In other words, "the nature and quality of the intrusion on the individual's Fourth Amendment interests [is weighed] against the importance of the governmental interests alleged to justify the intrusion." *United States v Place*, 462 US 696, 703; 103 S Ct 2637; 77 L Ed 2d 110 (1983).

In this case, the government's interest was the need to investigate suspected child abuse. The United States Supreme Court's balancing test applied in *Winston* is instructive here. In that case, the issue was whether the state could compel a suspected armed robber to undergo chest surgery to remove a bullet that the state argued would link the suspect to the crime. *Id.* at 755. The Court examined the "magnitude of the intrusion" – i.e., the risk involved and the potential infliction of trauma and pain – and the "extent of the intrusion upon the individual's dignitary interests in personal privacy and bodily integrity." *Id.* at 761, citing *Schmerber v California*, 384 US 757; 86 S Ct 1826; 16 L Ed 2d 908 (1966). These factors were weighed against the state's interest in gathering evidence of a crime. *Id.* at 765. In *Winston*, the Supreme Court determined that the proposed search was unreasonable because of (1) the uncertain risk that the surgery posed to the suspect and (2) the state's failure to articulate a compelling need for the bullet from the suspect's body. *Id.* at 766.

The case at bar can be easily distinguished. Here, the search that was conducted was a gynecologic exam. While somewhat intrusive, and potentially uncomfortable, it did not rise to the magnitude of a procedure so invasive as chest surgery. Furthermore, the search in this case was conducted on a possible victim with the ultimate objective being the protection of that individual from harm. Given plaintiff's inability to speak or otherwise communicate, the physical exam was the only effective means of determining whether she had been a victim of sexual abuse. Defendants articulated a very compelling reason for searching plaintiff. They suspected that she had been the victim of sexual abuse, possibly at the hands of someone in her own home. In order to protect her from further possible injury, they needed to determine whether plaintiff had indeed been sexually abused.

Additionally, the trial court correctly determined that the search of plaintiff was a lawful warantless search based on probable cause and exigent circumstances. Defendants had probable cause based on reliable information from school officials relayed to defendant Beauchaine of physical evidence "indisputably consistent with sexual abuse." Picotte reported the suspicious condition of plaintiff's pubic area, and defendant Beauchaine concluded on seeing plaintiff's vagina for herself that plaintiff may have been sexually abused. Because Picotte had worked

with plaintiff for nearly three years and changed her diapers on a daily basis, her observations were very reliable.

Further, exigent circumstances existed to support this warrantless search of plaintiff's vagina and rectum. Exigent circumstances exist where the police "establish the existence of an actual emergency on the basis of specific and objective facts indicating that immediate action is necessary to (1) prevent the imminent destruction of evidence, (2) protect the police officers or others, or (3) prevent the escape of a suspect." *In re Forfeiture of $176,598*, 443 Mich 261, 271; 505 NW2d 201 (1993), lv den 447 Mich 980 (1994), remanded sub nom *City of Detroit v $176,598 United States Currency*, 241 Mich App 118; 613 NW2d 752 (2000), rev'd 465 Mich 382 (2001), citing *People v Blasius*, 435 Mich 573; 459 NW2d 906 (1996). There must be a "compelling need for official action and no time to secure a warrant." *Blasius, supra*, at 583, n 7.

Here, defendants needed to have plaintiff examined quickly in order to prevent the potential loss of evidence – i.e., any biological evidence of sexual abuse that could be collected from plaintiff's person. Both Dr. Ritter and defendant Beauchaine testified that biological evidence usually only lasts for approximately twenty-four hours. Furthermore, determining whether plaintiff had been the victim of sexual abuse was necessary for the protection of plaintiff herself.

Thus, the trial court did not err when it found that defendants' "search" of plaintiff comported with the Fourth Amendment because the state's interest in obtaining potential evidence of child abuse outweighed the intrusion of the medical examination and because probable cause and exigent circumstances existed for a lawful warantless search.

We must next examine whether the trial court correctly determined that defendants were privileged to facilitate the search based on the search warrant statute, MCL 780.651. We find that the trial court did not err in determining that defendants were privileged.

"A person who otherwise would be liable for a tort is not liable where he acts in pursuance of and within the limits of a privilege of his own or of a delegable privilege of another." 4 Restatement Torts, § 890, p 475. The existence of a privilege "signifies that the defendant has acted to further an interest of such social importance that it is entitled to protection, even at the expense or damage to the plaintiff." Prosser & Keeton, Torts (5th ed), § 16, 109. While there is no applicable Michigan case law regarding the existence of a privilege in a situation such as this, the trial court relied on MCL 780.652(f), which provides that a lawful search may be conducted on "[t]he bodies or persons of human beings or of animals, who may be the victims of a criminal offense." We agree that this statue provided defendants with the privilege necessary to conduct the search of plaintiff's person.

Finally, we determine that plaintiff's argument that defendants were required to obtain a warrant for a body cavity search pursuant to MCL 764.25b is without merit. Under this section, MCL 764.25b(1)(b) defines "Body cavity search" as "a physical intrusion into a body cavity for the purpose of discovering any object concealed in a body cavity." Here, the examination of plaintiff was done for the purpose of obtaining medical evidence of sexual abuse, not for the purpose of discovering an object concealed in plaintiff's body. Therefore, we conclude that MCL 764.25b does not apply to the present case.

Affirmed.

/s/ Patrick M. Meter
/s/ Henry William Saad
/s/ Bill Schuette